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No. 14-1175

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF PROFESSORS OF FEDERAL JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Stephen I. Vladeck
4801 Massachusetts Ave. NW
Room 350
Washington, DC 20016
(202) 274-4241
svladeck@wcl.american.edu

Lindsay C. Harrison
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
lharrision@jenner.com

October 30, 2015

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction who teach and write about the law governing litigation within our federal system, including state sovereign immunity. *Amici* hold varying views on the constitutional status and substantive scope of state sovereign immunity. We also take no position on the merits of the decision below. Instead, we come together in this case solely to address the second question presented—"whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled."

As we explain in the brief that follows, we are of the view that (1) *Hall* was (and remains) rightly decided; and (2) if, contra *Hall*, the Constitution were interpreted to confer absolute sovereign immunity upon states in their sister states' courts, such a result would either leave litigants like Respondent with no forum for their claims, or it would place significant—and, in our view, untoward—pressure on this Court's original jurisdiction.

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1. The parties have filed blanket consents to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Both the Constitution itself and this Court's jurisprudence reflect a critical—and principled—distinction between two different species of state sovereign immunity: a state's immunity in its own courts and its immunity in the courts of another sovereign. "The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." *Hall*, 440 U.S. at 414; *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (quoting *The Federalist No. 81* (Alexander Hamilton)).

A sovereign's immunity in the courts of another sovereign, in contrast, does not inhere in *its* sovereignty, *see, e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822), and is therefore not a matter of absolute right, but rather one that is typically resolved by reference to the doctrine of comity, *see The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812). Like other common-law principles, comity can be overridden by positive law, just as the Eleventh Amendment overruled this Court's rejection of state sovereign immunity in federal courts in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). But neither Petitioner nor its many *amici* can identify a single source of positive law that expressly confers the

categorical sovereign immunity it seeks. *See Alden*, 527 U.S. at 738 (endorsing *Hall*'s holding that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another").

Not only was *Hall* therefore rightly decided, but, by depriving private parties of a forum in which to sue another state without its consent, the categorical sovereign immunity Petitioner seeks would cause mischief—either for the rights of litigants like Respondent or for this Court's institutional role. Even assuming that states may sue their sister states to vindicate the private rights of their citizens, *but see Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911), such suits may only proceed in this Court's original jurisdiction. *See* 28 U.S.C. § 1251(a). Although sovereign immunity would not apply in such a case, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838), this Court "is not suited to functioning as a *nisi prius* tribunal." *Maryland v. Louisiana*, 451 U.S. 725, 761 (1981) (Rehnquist, J., dissenting). "Such actions tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971)), and by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *Id.* (citation and internal quotation marks omitted). Thus, the rule Petitioner and its *amici* seek would not only put pressure on whether a state can (and would)

sue whenever one of its citizens is aggrieved by a sister state, but, if such suits do go forward, would thereby portend an uptick in this Court's original docket—one that would necessarily come at the expense of this Court's "primary responsibility" as a court of last resort on matters of federal law.

ARGUMENT

I. *NEVADA V. HALL* WAS RIGHTLY DECIDED.

This Court's state sovereign immunity jurisprudence has at its core two fundamental premises: "that the States entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), and that "[i]t is inherent in the nature of [that] sovereignty not to be amenable to the suit of an individual without its consent." *Hans*, 134 U.S. at 13 (quoting *The Federalist No. 81* (Alexander Hamilton)). Although Petitioner and its *amici* read this latter principle as extending to suits by virtually all comers in all forums, *Hall* correctly reiterated the nuanced—if at times elusive—distinction that this Court has always drawn between a state's sovereignty in its *own* courts and its sovereignty in the courts of another sovereign. To reach the conclusion that *Hall* was wrongly decided, this Court would not only have to collapse this distinction, but it would have to revisit the myriad precedents that depend upon it.

a. This Court's Jurisprudence Distinguishes Between a Sovereign's Immunity in Its Own Courts and Elsewhere.

As Justice Stevens explained in *Hall*, "The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Hall*, 440 U.S. at 414. The reason for this bifurcation has everything to do with the unique status of the states in the years between the signing of the Declaration of Independence and the ratification of the Constitution—as "sovereign states, possessing . . . all the rights and powers of independent nations over the territory *within their respective limits*." *Wharton v. Wise*, 153 U.S. 155, 166 (1894) (emphasis added); *see also McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796).

Thus, when the original states ratified the Constitution, they retained those aspects of the sovereignty they enjoyed as independent nations other than those which were surrendered to the federal government through the "plan of the convention." *See Alden*, 527 U.S. at 717. Whether or not, pace *Alden*, that sovereignty extended to immunity from suits under *federal* law, "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Hall*,

440 U.S. at 414; *see also Alden*, 527 U.S. at 715–17; *Hans*, 134 U.S. at 13.

b. At the Founding, Sovereign Immunity in the Courts of Another Sovereign Was a Matter of Comity.

The fact "that the States entered the federal system with their sovereignty intact," *Blatchford*, 501 U.S. at 779, hardly proves that they enjoyed immunity as an absolute right in courts of *other* sovereigns at the Founding; as Chief Justice Marshall noted in *The Schooner Exchange*, recognizing such immunity on the part of a foreign sovereign "would imply a diminution of [the home state's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." 11 U.S. (7 Cranch) at 136. In other words, where the interests of multiple sovereigns were implicated, the immunity inherent in a sovereign's home courts ran headlong into the foreign state's sovereign interest over *its* territory (and, as such, its tribunals).

This is not to say that sovereigns were therefore entitled to no special treatment in the courts of foreign sovereigns; quite the contrary. But "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* Thus, proper respect for sovereignty suggested that such consent could be presumed as a matter of comity. *See id.* at 136–37. Because it sounded only in comity, though, such

immunity could therefore be withdrawn (with appropriate notice) when the foreign sovereign's *own* interests justified such a measure. *See id.* at 146; *see also The Santissima Trinidad*, 20 U.S. (7 Wheat.) at 352–53.

As Respondent notes, "Far from seeking to discredit or explain away the principles of *Schooner Exchange*, [Petitioner] does not even refer to that decision." Resp. Br. at 22. But this Court *has* repeatedly reaffirmed the underlying soundness and continuing implications of these principles—not just in *Hall*, but throughout its foreign sovereign immunity jurisprudence. *See, e.g., Samantar v. Yousef*, 560 U.S. 305, 311 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848, 851 (2009); *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865–66 (2008); *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Unless *The Schooner Exchange* was wrongly decided—and all of these successive cases therefore wrong to rely upon it—then at the time of the Founding, a state's immunity in the courts of another sovereign was not an absolute right, but was rather a matter to be resolved through the doctrine of comity. *See generally Verlinden B.V.*, 461 U.S. at 486. ("As *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

c. No Constitutional Provision Overrides that Founding-Era Understanding.

Needless to say, principles of comity, deriving as they do from the common law, can be overridden by express statutory or constitutional command. So it was that this Court's decision in *Chisholm*, 2 U.S. (2 Dall.) 419, provoked the adoption of the Eleventh Amendment, and its clarification that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Although disagreement persists as to the scope of the Eleventh Amendment, what cannot be gainsaid is that provision's *distinct* relationship to the inherent sovereign immunity with which states entered the Union. As Justice Thomas has explained,

> Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision." As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but

> *one particular exemplification* of that immunity.

Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) (quoting *Alden*, 527 U.S. at 723) (emphasis added). Thus, the Eleventh Amendment provided the express constitutional command necessary to override the understanding that, rightly or wrongly, had driven the Justices comprising the majority in *Chisholm* to conclude that Article III authorized—and sovereign immunity did not preclude—the exercise of federal judicial power over a suit by a citizen of one state against another state. *See* 2 U.S. (2 Dall.) 419.

If Chief Justice Marshall's articulation of foreign sovereign immunity at the Founding, *see supra* Section I.B, is correct, then Petitioner must identify some comparable constitutional command that overrode those principles. Instead of doing so, however, Petitioner refers to this Court's jurisprudence recognizing that "the Constitution implicitly protects principles of sovereign immunity that go beyond the literal text." Pet'r Br. at 46. This statement is true so far as it goes. *See, e.g.*, *United States v. Lee*, 106 U.S. 196, 204–05 (1882) (recognizing the federal government's atextual sovereign immunity). But it certainly does not prove that the Constitution somehow overrode the comity-based approach to foreign sovereign immunity that governed one state's amenability to suit in the courts of its sister states prior to the Constitution's ratification.

Nor is there much to the argument that Article III *itself* overrode these principles insofar as it provided a neutral, federal forum for suits by states (or their citizens) against other states. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249. As Professor Woolhandler herself concedes, "During ratification and through the Court's *Chisholm* decision, debate arose over whether Article III and the state/citizen diversity provision (1) preserved state immunities, or (2) effected a waiver of sovereign immunity." *Id.* at 253. Whoever had the better of this argument (which remains at the heart of this Court's sovereign immunity jurisprudence today), no one suggested that, in fact, Article III recognized a *new* form of immunity insofar as it created a new forum for suits against unconsenting states. Because of *The Schooner Exchange*, however, this would *have* to have been the case in order for Petitioner to be correct—and for *Hall* to have been wrongly decided.

Aside from the paucity of contemporaneous historical evidence, this reading of Article III suffers from two separate—yet equally fatal—flaws: *First*, and logically, it would be more than a little odd to conclude that the Founders *expanded* state sovereign immunity by *authorizing* federal jurisdiction. *Second*, and pragmatically, this reading of Article III is belied by the ineluctable fact that the jurisdiction authorized by Article III did not have to be exclusive.[2] If Article III's

2. Congress has subsequently chosen to make this Court's original jurisdiction exclusive in suits between states, *see* 28 U.S.C. § 1251(a), but not in suits between states and other parties, *see id.* § 1251(b)(2), (3).

drafters meant, by authorizing *federal* judicial power in such cases, to displace pre-existing *state* authority over suits against other sovereigns, it stands to reason that they would have made their intentions far clearer.

Thus, *Hall* correctly concluded that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits" on a state's power to entertain a suit against another state. 440 U.S. at 420. Whatever the Constitution may have originally provided with respect to a state's amenability to suit in federal court and/or under federal law, as Justice Kennedy put it in *Alden*, "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." *Alden*, 527 U.S. at 738.

* * *

In any event, nothing in Article III *compels* the exclusivity of this Court's state-state jurisdiction. *See Mississippi* v. *Louisiana*, 506 U.S. 73, 78 n.1 (1992) ("Neither party disputes Congress' authority to make our original jurisdiction exclusive in some cases and concurrent in others. This distinction has existed since the Judiciary Act of 1789, and has never been questioned by this Court." (citation omitted)); *see also Ames* v. *Kansas ex rel. Johnston*, 111 U.S. 449 (1884) (upholding the constitutionality of concurrent original jurisdiction); Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 271 (7th ed. 2015) ("Since 1789, Congress has assumed that the Supreme Court's original jurisdiction could be made concurrent with the jurisdiction of the lower federal courts or of state courts.").

Of course, the fact that unconsenting states at the Founding did not inherently possess sovereign immunity in the courts of their sister states as a matter of absolute right does not (and did not) mean that they therefore lacked sovereign immunity in many—if not most—cases. It is unquestionably true that, at the Founding, states were *generally* not subject to suit in their sister states' courts. But as *Hall* correctly understood, this result sprung not from an absolute interstate sovereign immunity doctrine, but rather from the absence of sufficiently strong justifications in most cases for overriding the comity-based sovereign immunity that states then enjoyed. Thus, the question is not whether states generally enjoyed interstate sovereign immunity at the Founding; it is whether the Founders constitutionalized that immunity through Article III. As *Hall* concluded, though, that question answers itself.

II. OVERRULING *HALL* COULD PLACE UNDUE PRESSURE ON THIS COURT'S ORIGINAL DOCKET.

a. The Rule Petitioner Seeks Would Leave This Court's Original Jurisdiction as the Exclusive Judicial Forum for States Acting Unlawfully Outside Their Borders.

If, notwithstanding the above analysis, this Court were to hold that *Hall* was wrongly decided (and that principles of *stare decisis* do not support its retention), the result would be to leave individuals such as

Respondent without any forum in which to sue an unconsenting state that acts unlawfully outside its borders. In such a case, the only judicial remedy that even *might* be available for injuries such as those suffered by the Respondent here would be a suit by Respondent's *state* against Petitioner, since states do not enjoy any form of sovereign immunity in suits brought *by* their sister states. *See, e.g., South Dakota*, 192 U.S. at 318; *Rhode Island*, 37 U.S. (12 Pet.) at 720.

Even assuming a state would choose to expend the considerable resources necessary to bring such suits, this Court has, in the past, expressed skepticism that states have standing to sue their sister states as *parens patriae* solely to vindicate the rights of their citizens. *See, e.g., Oklahoma*, 220 U.S. at 289. Later decisions, however, have been somewhat more lenient in this regard. As Justice Douglas explained in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945),

> The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State.... The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative.

Id. at 450 (citations and footnote omitted); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (recognizing the existence of "quasi-sovereign" interests that allow states to proceed against other states or private parties as *parens patriae*).

To be sure, if states lack standing in cases such as this one, that is only further reason why the rule Petitioner and its *amici* seek would cause mischief—insofar as it would pretermit any remedy whatsoever, and thereby provide no legal deterrent for states to mistreat citizens of other states outside their borders (unless they then consent to suit for such abuses). But assuming *arguendo* that states *would* have standing to sue their sister states on facts similar to those presented here, such suits may only proceed in this Court's original jurisdiction. *See* 28 U.S.C. § 1251(a).

b. This Court Has Increasingly Disfavored Reliance Upon its Original Docket Except Where Absolutely Necessary.

That this Court would have the authority to exercise original jurisdiction over state-state suits arising out of facts like those presented here does not mean that this would be an especially wise alternative to the status quo. After all, "[t]he Court . . . is not suited to functioning as a *nisi prius* tribunal." *Maryland*, 451 U.S. at 761. Among other practical, logistical, and structural downsides, "[s]uch actions tax the limited resources of this Court by requiring [it]

'awkwardly to play the role of factfinder,'" *South Carolina*, 558 U.S. at 267 (quoting *Wyandotte Chemicals Corp.*, 401 U.S. at 498), and by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *Id.* (citation and internal quotation marks omitted).

All of these concerns help to explain Chief Justice Fuller's admonition that this Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute," *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), even in cases in which it is putatively exclusive, *see Texas v. New Mexico*, 462 U.S. 554, 570 (1983) ("[W]e have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction."); *see also, e.g., Louisiana v. Mississippi*, 488 U.S. 990 (1988) (mem.) (denying leave to file a bill of complaint over a three-Justice dissent).

Thus, the rule Petitioner and its *amici* seek would not only put pressure on a state to sue whenever one of its citizens is aggrieved by a sister state, but it could easily come to portend an uptick in this Court's original docket—one that would necessarily come at the expense of this Court's "primary responsibility" as a court of last resort on matters of federal law. As the younger Justice Harlan presciently warned over four decades ago:

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders.... It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.... [T]he evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497–98 (1971). Without question, state courts are a better forum for such disputes. And as *amici* have demonstrated, *Hall* correctly determined that the Constitution does not prevent them from serving such a role. Given the "anomalous" result that would

otherwise follow, *see id.*; *cf. Hans*, 134 U.S. at 10 (invoking a similarly "anomalous result" as justification for applying the Eleventh Amendment to suits by a citizen against his own state), *Hall* should be preserved.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that *Nevada v. Hall* should not be overruled.

Respectfully submitted,

Stephen I. Vladeck
4801 Massachusetts Ave. NW
Room 350
Washington, DC 20016
(202) 274-4241
svladeck@wcl.american.edu

Lindsay C. Harrison
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
lharrision@jenner.com

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Counsel for *Amicus Curiae*

APPENDIX

APPENDIX

AMICI CURIAE LAW PROFESSORS

(institutional affiliations are provided for identification purposes only)

ERWIN CHEMERINSKY
Founding Dean and Distinguished Professor of Law
University of California, Irvine School of Law

BROOKE D. COLEMAN
William C. Oltman Professor of Teaching Excellence and Associate Professor of Law
Seattle University School of Law

ERIC M. FREEDMAN
Siggi B. Wilzig Distinguished Professor of Constitutional Rights
Maurice A. Deane School of Law, Hofstra University

JONATHAN HAFETZ
Associate Professor of Law
Seton Hall University School of Law

MATTHEW I. HALL
Associate Professor of Law
The University of Georgia School of Law

LEE KOVARSKY
Professor of Law
University of Maryland
Francis King Carey School of Law

ADAM STEINMAN
Frank M. Johnson Faculty Scholar and
Professor of Law
University of Alabama School of Law

STEPHEN I. VLADECK
Professor of Law and
Associate Dean for Scholarship
American University Washington College of Law

LOUISE WEINBERG
William B. Bates Chair for the Administration of
Justice
University of Texas School of Law